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No.

In the Supreme Court of the United States

October Term, 1999

DAN RODNEY JOOS,
Petitioner,

versus

PIPER C. JOOS (MONTE),
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UTAH COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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42 pp

QUESTIONS PRESENTED

1. In light of *Troxel v. Granville* (decided June 5, 2000) whether § 30-3-5 of the Utah Code impairs the role of fit parents in family decisions beyond constitutional limits.

2. Whether parental and property protections of the Bill of Rights and Fourteenth Amendment are pre-empted by states' interest in "the marital status."

3. Article III of the Utah Constitution creates a unique federal property/religion right that "shall be irrevocable without the consent of the United States."
   a. Whether the Fourteenth Amendment requires the state to regulate joint property of religious parents who married the same as joint property of cohabiting parents.
   b. When religious beliefs preclude hostility, can states take the Father's property without compensation by refusing to allow non-adversarial procedures?
   c. To resolve the conflict of state courts, whether the "continuing jurisdiction" over "property" must be interpreted the same as a "continuing jurisdiction" over "custody, support, health and debts."

4. Whether determination of constitutionality of the statute by the Utah Court of Appeals, after silencing the Father by eliminating briefing, hearing transcripts and argument, violates due process and First Amendment protections of free speech and "to petition the government."

PARTIES TO THE PROCEEDING
(The State of Utah is a party)

Dan is homeless. For years he has been without heat in winter, sleeps on the ground and showers at truck stops because the home and furnishings that he bought and paid for as breadwinner belong to the state, the decision making party, to use for the benefit of the children. The state claims to be a party in all property and parental decisions because Piper and Dan made a religious and responsible choice to marry rather than have children out of wedlock.

This petition seeks to eliminate the jurisdiction of the state as a "continuing" party over property and parental choices of fit parents who married. Although the Court of Appeals says in its decision, "when [the marital] status is created, the rights involved are not merely private, but are also of public concern....," the state should no longer be an eternal party with unlimited power over the property and children, and should be limited to defining and preserving marriages.

No longer should the children be "the mere creature of the State." (*Troxel v. Granville* 530 U.S. _____ [2000] page 7)

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Petitioner respectfully requests that a writ of certiorari issue to review the judgment, opinion and constitutional jurisdiction of the Utah Court of Appeals.

OPINIONS BELOW

The Utah District Court did not expressly pass on the constitutionality of the statute, leaving that duty to the appellate courts as encouraged by the Judicial Conduct Commission; therefore, only the opinions of the Utah Court of Appeals are in this petition.

The decision of the Judicial Conduct Commission is an unpublished letter.

The opinion of the Utah Court of Appeals regarding constitutionality of Section 30-3-5, Utah Code Annotated 1953, as amended, is in form of a memorandum decision designated "not for official publication." Similarly it's order that denied the petition for rehearing, addressing due process and First Amendment violations, is unpublished.

All the above decisions are reproduced in the Appendix to this petition.

JURISDICTION

The judgment of the Utah Court of Appeals was entered on November 4, 1999. A petition for rehearing, timely filed, was denied on December 17, 1999. The order denying discretionary review by the Utah Supreme Court was entered March 13, 2000.

The jurisdiction of this court is invoked under 28 U.S.C. § 1257.

The constitutionality of Section 30-3-5 Utah Code Annotated 1953, as amended is in question. 28 U.S.C. § 2403(b) may apply and shall be served on the Attorney General of Utah.

CONSTITUTIONAL PROVISIONS

CONSTITUTION OF UTAH - ARTICLE III

The following ordinance shall be irrevocable without the consent of the United States and the people of this State:

First: - Perfect toleration of religious sentiment is guaranteed. No inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship; but polygamous or plural marriages are forever prohibited.

1896

CONSTITUTION OF THE UNITED STATES
ARTICLE VI

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

AMENDMENT I - Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT IV - The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated....

AMENDMENT V - Section 1....nor shall any person....be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT IX - The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X - The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT XIV - Section 1....No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES

UTAH CODE ANNOTATED 1953
Husband and Wife

30-3-5. **Disposition of property - Maintenance and health care of parties and children - Division of debts - Court to have continuing jurisdiction -**

(1) When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts or obligations, and parties. The court shall include the following in every decree of divorce:

(a) an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children;

(b) if coverage is or becomes available at a reasonable cost, an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for the dependent children;

(3) The court has continuing jurisdiction to make subsequent changes or new orders for the custody of the children and their support, maintenance, health, and dental care, and for distribution of the property and obligations for debts as is reasonable and necessary.

UTAH RULES OF APPELLATE PROCEDURE
Rule 10. Motion for summary disposition

(e) *Ruling of court.* The court, upon its own motion, and on such notice as it directs, may dismiss an appeal or petition for review if the court lacks jurisdiction; or may summarily affirm the judgment or order which is the subject of review, if it plainly appears that no substantial question is presented; or may summarily reverse in cases of manifest error.

STATEMENT OF THE CASE

Like many cases, *Troxel v. Granville* (2000) addresses the after-effects of broken homes. The present case gives the Supreme Court the opportunity to change laws that cause families to fail. The

only way to increase the number of children raised by their own fathers; to increase the marriage rate and lower the rate of dissolution is to defend the constitutional rights of parents who married from poorly written state laws applied by the state government's judiciary branch. Utah's Appellate Courts want to change procedures without reviewing the challenged statute's constitutionality.

Ronald Reagan wrote:

> "No one suffered more while performing his duties as President, and no one stood more upright, than did Abraham Lincoln. It should not surprise us that it was Lincoln who stated a simple but eloquent criterion for success: 'I desire to so conduct the affairs of this Administration that if, at the end, when I come to lay down the reins of power, I have lost every other friend on earth, I shall at least have one friend left, and that friend shall be down inside of me.'"

President Abraham Lincoln, who proclaimed Thanksgiving a national holiday, gave a presidential pardon to a turkey, raised at the White House, because of the tears of his son, Willie. Later tragedy struck, Willie died and his parents were devastated. Their marriage suffered.

In the biography, *Abraham Lincoln* (1952) by Benjamin P. Thomas, it is noted: (p. 303)

> "Mrs. Lincoln became hysterical. Long vigils had exhausted her; she seemed unable to regain her mental balance. One day Lincoln gently led her to a window, put his arm around her waist, and, pointing to the asylum in the distance, pleaded: 'Mother, try and control your grief, or it will drive you mad and we may have to send you there"
>
> (P.304) "Lincoln found it difficult to shake off the affliction of Willie's death. From this personal bereavement and the trials of office

> he came to feel the need of strength beyond his own resources. More and more his official utterances and state papers breathed dependence on a Higher Power, whose existence he may have doubted in his callow years."

The author gives many examples of Mary Lincoln's "irrational actions." It is impossible to summarize her grief and suffering expressed on pages 478-483, 517-518; but had this couple been under the jurisdiction of modern-day Utah, their treatment would defy reason.

The seemingly sole procedure allowed by the Utah Court of Appeals for Piper and Dan, in similar circumstances, is to push fathers out of the lives of their children in favor of state control over property and family matters. In harmony with his religious beliefs, Dan had to wait until Piper was no longer his wife (October 1998) and was moving out of the marital home to seek his share of the property because the state courts would not allow any non-adversarial procedures.

After a motion (November 16, 1998), to open the way for the father to be involved with the children under the "continuing jurisdiction" clause of Utah Code 30-3-5(3), Dan filed complaints (January 1999) with the State Judicial Conduct Commission for the judiciary's refusal to enforce many pages of Title 30 statutes, public policy and mandatory duty. (Two of five Supreme Court Justices later resign.) Favoring enforcement of a single discretionary sentence of Utah Code 30-3-5(1), the Utah Court of Appeals allows no procedures and enforces no laws that help parents in grief. Eliminating fathers from close relationships with their children and allowing judges to act as a substitute-fathers seems to be their only goal.

On February 17, 1999, the Judicial Conduct Commission (Appendix, A-4) decides it cannot take action, preferring an appellate court solution. Accordingly, Dan filed a motion on March 3, 1999 asking the District Court "to dismiss all such proceedings for lack of

CONSTITUTIONAL JURISDICTION." (emphasis in original) Explaining that Utah Code 30-3-5 penalizes people who marry and rewards single and cohabiting parents, Dan lists over a dozen constitutional provisions that this statute violates. He tells the court that the state cannot require parents who married to buy insurance, but allow parents who don't marry to make that decision themselves.

The motion names the IV, V, IX and XIV Amendments of the Federal Constitution as violated by the statute. Repeatedly, at the hearings, the court is told how Dan and Piper are discriminated against by the state compared to their sisters, who are unmarried mothers.

On March 10, 1999 the father told the District Court that the state cannot "bash and discriminate against Fathers, deny equal protection to Fathers." If the state violates the constitutional protections over parental rights and property for "the benefit of the children", then fathers must be treated equal to mothers. The discussions of violations of the Bill of Rights by the statute have focused on the standards of strict scrutiny, the state's narrow interest in marriage preservation and how states are driving fathers from the family.

Abundant citations to the U.S. Supreme Court decisions are made throughout. One argument in particular (April 20, 1999) focuses on *Lewis v. Casey* 518 U.S. 343 (1996). Courts should remedy "specific violations", not try and run the whole show. If federal judges are not responsible to "micromanage" prisons, it makes even less sense for state judges to seize property and usurp parental authority of law-abiding families.

The May 3, 1999 hearing on constitutionality focused on examples of how Utah Code 30-3-5 is invalid on its face and how it is unconstitutional as applied, especially in this case.

Again on May 11, 1999, the father challenges the statute on its "face and as applied." The Bill of Rights pre-empts laws like this under "strict scrutiny requirements."

On May 24, 1999, Dan focused of the court's duty to defend the Constitution and our rights. "Utah Code 30-3-5 is not a carefully worded statute....ignores 'the compelling interest' requirement....vagueness...." Many Supreme Court decisions are proffered, but the District Judge will not review the statute under strict scrutiny.

Exercising his right of appeal, Dan files a notice of appeal to the Utah Court of Appeals. In harmony with the Judicial Conduct Commission's decision, the docketing statement raises the same issues and authorities that were before the District Court.

Piper's challenge to the jurisdiction of the Court of Appeals is rejected by that court, but it uses the opportunity to summarily affirm the lower court and to decide that the Bill of Rights and strict scrutiny are pre-empted by the "public concern" in "the marital status." (Appendix, A-1) (Without briefing, the Court of Appeals decides issues that the lower court wouldn't address)

A petition for rehearing (November 16, 1999) challenges due process violations; quoting the First Amendment and Article VI of the Federal Constitution. Many conflicts with other state appellate courts are given. The plain language of the Utah Rules of Appellate Procedure forbids summary affirmance when constitutional questions are raised. Neither the Court of Appeals nor lower court gives a single constitutional citation or authority in support of the law although confronted with extensive authorities in opposition to its validity. Because the Court applies the law in question, Dan is not allowed to use the right of appeal to brief his arguments even though the Utah Rules of Appellate Procedure plainly require it.

On December 17, 1999 (Appendix A-6), The Utah Court of Appeals denies the petition for rehearing, with citations that are not determinative, and without a review of the plain language of Rule 10(e), Utah Rules of Appellate Procedure.

A timely petition for writ of certiorari is filed January 18, 2000 in the Utah Supreme Court which is denied March 13, 2000. (Appendix A-8).

IMPORTANT REASONS FOR GRANTING THE WRIT

A. The U.S. marriage rate is at an all time low, 1/3 of the nation's children are born out of wedlock and in 1998 "more than 31,000 babies were delivered in hospitals and left there by mothers" because state judges displace fathers by assuming control, burden parents who married and discriminate in favor of cohabiting and single parents.

In *Troxel v. Granville* (2000), the Supreme Court lists much information about the problem of single-parent households in Section II.

Many of the nation's social problems can be traced to absent fathers. Section 30-3-5, Utah Code Annotated, 1953, as amended is the type of law administered by states the encourages parents to have children out of wedlock by burdening and depriving private property and fundamental rights of parents who commit to marriage.

Lacking a marriage commitment, many mothers are left with the unfortunate choices of giving the child up for adoption, abortion, welfare, single parenting or perhaps "living together" for a few years. If state judiciaries are unwilling to cooperate with the other branches of the government to make sure little children are raised by their own mom and dad because lawyers get paid lots of money and judges exercise unrestrained power every time they break up a family, the only solution is strike down the laws that discriminate against people who marry compared to parents who have children out of wedlock. Treated equally, more people will decide to marry. More marriages will remain intact because, when tragedy strikes or problems arise, no one - for profit or power - will undermine the relationship, and far more children will have their own mom and dad to help them through life. Preventing societal problems, in this way, surpasses any remedial measures government imposes.

On June 5, 2000 the U.S. Supreme Court reaffirmed parental rights by striking down a state law that gave judges too much power over parents, *Troxel v. Granville* says: (page 10)

> "Accordingly, so long as a parent adequately cares for his or her children (i.e. is fit) there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."

In this case, although no Utah court finds that either parent is negligent or unfit in any way, and they were merely at court for a change in their relationship, the state judge uses Utah's vague law to simply take over all property and decision-making forever.

Perhaps the Utah Court of Appeals refuses to review the statute under strict scrutiny because if it finds that the law is unconstitutional "as applied", then it incriminates the judges and justices of the state judiciary. This is a poor reason to violate liberties protected by the Constitution. Everyone can make mistakes, admit them, and move on. In the words of the Supreme Court, Utah law is also "breathtakingly broad." (*Troxel*, page 8)

The Supreme Court says in *Planned Parenthood v. Casey* 505 U.S. 833 at 898 (1992):

> "The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power, even where that power is employed for the supposed benefit of a member of the individual's family."

In spite of the plain language of the first line of the statute that "the court may include in it equitable orders relating to the .... property...", the District Judge decides that, rather than equally divide the property, the state will seize the parents' property and manage it "for the benefit of the children." Later the court decides that even when the custodial parent ceases to use the property for the children and moves out of the home, the other parent (Father) has no right,

ever, under section (3) of the statute ("The court has continuin jurisdiction to make subsequent changes or new orders.... for the distribution of the property...") to ask to use this same property for the children's benefit. By not following the statute's plain language to fairly divide the property, this law is unfair to fathers under the "best interest of the children" standard the judges use because Dads seldom have custody. The judge says, "Give the Dad's share to Mom for the kids, he doesn't need it."

In the present case the mother gets two homes and the father still lives out of his car even though he paid for the unused home entirely himself. No wonder Dads fail to commit to marriage when it is so politically correct these days for the states to seize property and discriminate against fathers just because they are men who married. Promises of state appellate courts to change procedures is not a cure for a defective statute. Any judge can violate constitutional rights with such a vague law at any time.

There is little incentive for the state court to police the constitutional boundary between State government and "the people" when it is the court that stands to lose power. The statute is written so vaguely that it justifies virtually any policy of the Court of Appeals. With this lack of precision, the appellate courts have decided to change policy without reviewing the law.

There is a need for the Supreme Court to protect fundamental rights of fathers who married from the infringement of states and laws when family relationships change. Much has been done to protect states rights, the Supreme Court should also protect the liberties of "the people" from the states that are guarded under the Ninth and Tenth Amendments. Until these issues are clarified, the need of children for their own fathers is seriously and substantially hampered and frustrated by states who seek to replace fit fathers with substitute parents, who are state judges, in control of men's private property.

It is error for the Utah Court of Appeals to claim unlimited and never ending power simply because "the marital status.... is a

public concern." (Appendix, A-3) Any truth to that statement does not waive "strict scrutiny" and "narrowly tailored to a compelling state interest" protections of the Bill of Rights as that court contends. There remains a duty, as stated in *Planned Parenthood v. Casey,* (P.845), "to follow an elaborate course of reasoning" to see if the statute "meets constitutional standards." (P.847); "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." This applies also to judicial branch of the government. This statute does not meet the standards set throughout this or other Supreme Court decisions.

The statute's standards are so vague, seemingly anything a state judge orders that includes Piper's or Dan's name, their children or property is allowed; even if these parents desire otherwise. The statute has no standards, restraints, safeguards or purpose. In *U.S. v. James Daniel Good Real Property,* 510 U.S. 43 (1993), the U.S. Supreme Court explains the Fourth Amendment and says at page 52:

> "But the purpose and effect of the Government's action in the present case go beyond the traditional meaning of search and seizure. Here the Government seized property not to preserve evidence of wrongdoing, but to assert ownership and control over the property itself. Our cases establish that government action of this consequence must comply with the Due Process Clauses of the Fifth and Fourteenth Amendments."

Even worse than the Washington State statute struck down in *Troxel v. Granville*, the innocuous language of Utah's statute gives no warning that the state can seize private property "for the benefit of the children" or that only mothers are allowed to profit from this seizure. The Constitution protects property and parental rights under many provisions, this statute forever waives them all in two little sentences when a parent seeks to change a relationship. The state never tells couples that they are waiving rights in the Bill of Rights when they seek to marry. Certainly no couple signs such a waiver. The Utah

Court of Appeals says the state can seize control of the property and children anytime after marriage; however the plain language of the statute is neither mandatory nor excludes *parental participation.* The Utah Court of Appeals claims parents can never change the property distribution, and can make custody, support and other changes only if a "substantial change" occurs (see Appendix, A-2), but the plain language of the statute says parents can have the court make changes in property and children anytime that are "reasonable and necessary."

It is important and necessary for the Supreme Court to intervene because the Utah Court of Appeals interpretation precludes parents from making daily decisions and changes that are a parent's duty. When the court orders a father to visit the children at 5:00 on Wednesday, the order acts as a bar to both parents, who may need to change schedules often, throughout the year, when no "substantial change" exists. Parents who used to "live together" are completely free of any state interference in these matters, even though they are in the same circumstances as Piper and Dan. Parents who married are required to pay court fees, hire lawyers and seek permission from a state judge just to change custody or other parental decisions.

According to the Supreme Court, the Constitution says the state had better have a pretty good and narrow reason to even be involved in private property and parental decisions. Over a century ago, this court said, ".... almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen." *Chicago, B.& Q.R. Co. v. City of Chicago,* 166 U.S. 226 at 236 [1897] and page 237 (quoting Justice Miller):

> "....after observing that there were private rights in every free government beyond the control of the State, and that a government , by whatever name it was called, under which the property of citizens was at the absolute disposition and unlimited control of any depository of power, was, after all, but a despotism, said: 'The theory of our governments,

> state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all limited and defined powers. There are limitations on such power, which grow out of the essential nature of all free governments, implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name.' No court, he said, would hesitate to adjudge void any statute declaring that 'the homestead now owned by A. should longer be his, but should henceforth be the property of B."

Utah Code 30-3-5 is such a statute, granting all power to the government over the parents, their children and their property. It is unconstitutional on its face, yet the Utah Appellate Courts refuse to review the statute under strict scrutiny either because they misunderstand that the state's interest in marriage does not pre-empt such a review or because such a review could diminish power that has been exercised for decades. It is not human nature to make "self-deprecatory" judgments like the Supreme Court of Washington in *Troxel* or in the spirit of *Marbury v. Madison* , and only the highest court in this land can tell fifty state judiciaries how and why to do it now. Then the way will open for more parents to marry and stay married, and for the children of the next generation to be raised by their own parents. Such a change will cure many of the social ills that afflict this nation.

Section 30-3 of the Utah Code says nothing else about property. All it has to say is in these two lines and see how such simple sentences have escalated into such widespread discrimination and deprivations of constitutional rights. "Private" property is renamed "marital" property and "poof!" the Bill of Rights no longer applies.

The law also commands parents who married to buy dental insurance whether or not it is needed, cost-effective or provides the coverage family members require. For these parents, the state has

eliminated any and all participation in the decision; the same with health insurance.

Today thirty million children live apart from their fathers and one-third of those will not see their fathers this year (KBYU Television, May 28, 2000 8:40 am.) because "fatherhood has not been culturally valued." (Don Eberly, chairman; National Fatherhood Initiative [front page, *The Salt Lake Tribune*, August 31, 1999]) William F. Buckley claims, "The greatest social problem in America is one-parent households." (*The Salt Lake Tribune*, January 9, 1999 A9)

The National Center for Health Statistics now says "one-third of American babies are born out of wedlock." (*The San Jose Mercury News*, April 17, 2000 reprinted in The Salt Lake Tribune, A10) It continues:

> "Some people are forming traditional families - Mom, Dad, and the kids - without acquiring a marriage license.
>
> But never-married fathers are much more likely to drift away from their children than divorced fathers.
>
> That's the problem. Children born outside the bonds of matrimony usually are raised without the stability, security and income of a two-parent family. It shows up in higher rates of infant mortality, school failure, criminal behavior, addiction, unemployment, welfare dependency and, of course, unwed pregnancy."

This statute causes these problems as fathers seek to avoid state control. Judges will leave them and their property alone so long as they don't marry.

The *New York Times* speaks of "financial incentives that can make it more appealing to stay single." In an article headlined

Marriages: In National Decline it says: "In New York, the total number of marriages fell 30 percent between 1997 and 1999." (January 10, 2000, *The Salt Lake Tribune*, A2) Similarly, as reported by the Associated Press on June 1, 2000, Utah's marriage rate has declined since 1996 from 10.9 to 8.3 marriages per thousand residents. (*The Salt Lake Tribune*, B-3)

The National Marriage Project reported in *The Washington Post* that "Americans are less likely to marry than ever before" and

> "The nations marriage rate had dipped by 43 percent in the past four decades, leaving it at its lowest point in recorded history.
>
> "The National Marriage Project report blames the declining marriage rate on people postponing marriage until later in life and on more couples deciding to live together outside of marriage. According to the report, nearly half of people between 25 and 40 have at some point set up a joint household with a member of the opposite sex outside of marriage." (*The Salt Lake Tribune*, July 2, 1999 A10)

This state-induced fear of marriage also drives mothers away. According to the *Dallas Morning News*, April 21, 2000 [*The Salt Lake Tribune* A13]:

> "Federal officials say more than 31,000 babies were delivered in hospitals and left there by mothers in 1998, the last year for which figures are available. Determining how many are left in alleys, warehouses and other public places is more difficult."

There is little the U.S. Supreme Court could do that would

have a more positive effect on society than granting certiorari to strike down state laws which violate the property and parental rights of parents who married. Little children need to be raised by their own mom and dad whenever possible. Abundant Supreme Court decisions prove this law is invalid. (*Washington v. Glucksberg*, 521 U.S. 702 (1997), *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) .

B. States and the Utah Court of Appeals have expanded the states' interest in marriage into a lifelong business regulating property and parental decision-making of fit parents who have broken no laws. State judiciaries cause conflict, are unfair to fathers and have invalidated constitutional protections of parents who make a moral and religious choice to marry.

The U.S. Supreme Court said June 5, 2000, *Troxel v. Granville:* (Page 4) (citations omitted)

> "The court rested its decision on the Federal Constitution, holding that §26.10.160(3) unconstitutionally infringes on the fundamental rights of parents to rear their children....the Constitution permits a State to interfere with the right of parents to rear their children only to prevent harm or potential harm to a child. Section 26.10.160(3) fails that standard because it requires no threshold showing of harm.
>
> (Page 8) "Section 26.10.160(3) contains no requirement that a court accord of parent's decision any presumption of validity or any weight whatsoever. Instead, the Washington statute places the best-interest determination solely in the hands of the judge. Should the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails."

The U.S. Supreme Court should review the special federal right, embodied in the Utah Constitution since 1896, in harmony with the equal protection clause of the Fourteenth Amendment. Since statehood, Article III of the Constitution of Utah has been "irrevocable" without congressional consent. It protects property from the "state" no matter what "his or her mode of religious worship." Utah 30-3-5 takes property without compensation when one endeavors to live religious beliefs and violates this right and the Federal Constitution.

The Utah Court of Appeals says in it's decision (Appendix, A-3) that it "reject[s]" arguments that a "continuing jurisdiction over these subjects discriminate against married persons in favor of unmarried or cohabiting persons" or that "statutes are vague and overbroad or violate equal protection guarantees." It asserts that the state courts can violate the Federal Constitution because "when [the marital] status is created, the rights involved are not merely private, but are also of public concern...."

The Court of Appeals has already proven in this case that their only concern is to engender conflict and seize control. It enforces no laws and allows no procedures that actually saves marriages nor does it uphold this state's interest in marriage (see U.S. Supreme Court, Petitions for Certiorari, 97-1677 and 97-1848). Without regard for religious beliefs, the courts punish whoever is too agreeable or without enough conflict, because it diminishes the judiciary's power to impose its own "better" solution. Such is the authority that the Utah Court of Appeals gives in its opinion. (Appendix A-3) In *Neilson v. Neilson* 780 P.2d 1264 (1989), it doesn't uphold marriage, it only voids a prenuptial agreement on which the wife was depending "for the reason that it encourages conduct designed to facilitate the breakup of a marital relationship." In other words, the marriage must end; only with the judge making all the decisions and tens of thousands of dollars of attorney fees owing for a marriage that lasted four months before an annulment was sought. Small wonder people choose to "live together" instead. The Court of Appeals brings up a 1903 case that invalidates a "property settlement agreement," and many authorities that lead couples to believe that only cohabiting couples get to make any decisions themselves; couples who married

just give lists of everything they have to the state and a judge imposes his own personal philosophy.

The duty of state appellate courts is to make a reasoned judgment on constitutional questions, which the Utah Court of Appeals does not do. It refuses to address why Piper and Dan, who are not married, are required by the state to buy health and dental insurance, but married couples, including those who live separately, are not. Piper and Dan both have sisters who didn't marry, each with many children, who have no requirements to buy insurance, but the Court of Appeals refuses to analyze or express a narrow state interest as to why such different treatment of unmarried parents.

Similarly, under the equal protection clause, the court gives no justifiable reason why, for the rest of their lives, Piper and Dan are not allowed by the state to trade joint property, but cohabiting parents are allowed to do whatever they please with their children, custody and joint property, without any oversight of the state, when they split up.

Although the Federal government "guarantee[s] **perfect toleration** of religious sentiment" and that "no inhabitant of this State **shall ever** be molested in **person or property** on account of his or her mode of religious worship" (Utah Constitution, Article III, emphasis added), Utah Code 30-3-5 takes property without compensation and violates the liberties protected by the Bill of Rights because of religious beliefs and practices. Marriage, for centuries, has been a religious choice. When one makes the religious choice to marry, the State of Utah says the Bill of Rights is waived even though the U.S. Supreme Court said in *College Sav. v. Florida Prepaid Postsecondary* 527 U.S. 666 at 682 (1999) (citations omitted):

> "The classic description of an effective waiver of a constitutional right is the 'intentional relinquishment or abandonment of a know right or privilege.' '[C]ourts indulge every reasonable presumption against waiver' of fundamental constitutional rights. (We "do not presume acquiescence in the loss of fundamental rights")."

In the opinion of the Utah Court of Appeals, the statute is not unconstitutional on its face because of the state's interest in preserving marriage, but their failure to address the constitutionality of this law "as applied" is an entirely different matter. Recently the state appellate courts publicly announced that district judges would not be allowed to participate in property decisions except as a last resort. Rather than address the issue of the validity of the statute "as applied", the courts seek to cure its unlawful effects by changing procedures and deny Dan redress for the injury they have caused him.

The new Chief Justice for the Utah Supreme Court publicly announced: (*The Salt Lake Tribune,* January 17, 2000 B5)

> "Another example of a shift in emphasis is the future way family-law cases will be handled. Divorces and custody matters will be mediated rather than litigated.
>
> "The traditional adversarial legal process is designed to create winners and losers and is ill-suited to creating solutions to family disputes that respect the ongoing nature of a family, and the relationships that comprise a family." Howe said.
>
> Judges will hear family-law cases only when other means of resolution fail.
>
> '"Agreements reached by the parties rather than imposed on the parties are far more likely to last, and lasting resolutions are in everyone's best interest, especially the children." Howe said.'

This is a grand and far departure from the treatment Piper and Dan received, but still is no cure for a defective statute. This couple received threatening letters from the District Court demanding separate lists of all their property to be given to the District Judge. When they went to a pretrial settlement conference they were informed that it is a closed door meeting that parents are not allowed to attend; the judge makes the decisions without input from the parents. The judge orders the family home, that is mortgage-free, to be equally divided between Piper and Dan, but the state is taking Dan's share, without compensation, and giving it to Piper for the

benefit of the children. Piper is warned that she gets this and Dan's other personal property free of charge so long as she doesn't remarry. (See Petition for Writ of Certiorari, No. 97-1848, pages A-8,A-9)

No one, including the Court of Appeals, disputes that this violates Seizure, Due Process and the Takings Clause of the Federal Constitution, but that court refuses to defend the Constitution in spite of being bound by the Supremacy Clause.

Repeatedly Dan tells the District Court that his religion forbids him to be an adversary to Piper while they are married and the Utah Court of Appeals says he is barred from asking to use the property after they are no longer married even after Piper has moved out of the home. Dan loses all benefit of the marital property for living his religion.

However, the statute is invalid because constitutional federal law says that "irrevocable without the consent of the United States....no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship" (Article III, Utah Constitution)

Justice Holmes has been quoted repeatedly throughout the past century. In *Yee v. City of Escondido, Cal.* 503 U.S. 519 at 522 (1992) the U.S. Supreme Court says:

> "The Takings Clause of the Fifth Amendment provides: '[N]or shall private property be taken for public use, without just compensation.' Most of our cases interpreting the Clause fall within two distinct classes. Where the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation.
>
> (P.529) "In the words of Justice Holmes, 'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.' *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, (1922)"

The Utah Court of Appeals fractured interpretation of the plain language Utah Code 30-3-5(3) is proof of its invalidity and vagueness. Although the statute does not distinguish property in any way from the "continuing jurisdiction to make changes or new orders" over a multitude of subjects, the court says only property "is barred by res judicata." (Appendix, A-2) All the rest of the subjects can be changed.

If the statute is not unconstitutional, the Supreme Court should resolve this conflicting interpretation with opposing appellate judgments. Other courts hold that a "continuing jurisdiction" means just what the plain language implies: Res Judicata Doctrine does not apply. Shortly before the instant decision, using many citations, a different panel of the Utah Court of Appeals says for a continuing jurisdiction case that the "application of res judicata makes little sense." It goes on to say: (State in interest of H.J., 986 P.2d 115 at page 125 [August 5, 1999])

> "....continuing jurisdiction which enables them to review and re-evaluate children's needs. The res judicata doctrine does not lend itself well to such a setting, when passage of time itself can result in substantially different circumstances."

Only the Supreme Court can stop fatherlessness by requiring states to treat fathers on level ground with mothers by passing laws that treat property and parental rights of all parents alike.

C. Although nearly half of the Utah Supreme Court stepped down from the bench after complaints were filed with the Judicial Conduct Commission, the Court of Appeals seeks to maintain the status quo and prevent improved treatment of families by circumventing the First Amendment and limiting the father's right of appeal to merely posing the constitutional questions the Commission said the "appellate court" should decide.

Above all else, the speech protected by the First Amendment is political speech against the abuse of governments. Because the content of the questions raised to the Utah Court of Appeals is primarily a claim that the court is applying unconstitutionally Section

30-3-5 of the Utah Code, it seeks to violate the Rules of Appellate Procedure and silence the speech of the petitioner (appellant).

The Court of Appeals admits in the summary judgment (Appendix, A-2) that it has jurisdiction in this case. Rule 10 (e), Utah Rules of Appellate Procedure says in plain language that the court "may summarily affirm.... if it plainly appears that no substantial question is presented." Dan raised in District Court and used his right of appeal to challenge how the Utah courts apply Section 30-3-5 of the Utah Code in violation of federal constitutional rights. The Court of Appeals does not dispute these are "substantial questions." The district court did not even decide these issues, leaving the issues to be decided in the higher state courts like the Judicial Conduct Commission directed.

The plain language of the rule says summary affirmance is not allowed if important questions are raised. State appellate courts reverse unsuitable summary judgments of lower courts all the time.

On January 31, 2000 the Utah Supreme Court dissent said in *Malibu Investment v. Sparks*, 388 Utah Adv. Rep. 3 at page 12:

> "It has been noted:
> Cases premised on allege violations of the constitutional or civil rights of plaintiffs frequently are unsuitable for summary judgment. As is true with other cases involving important public issues, courts may refuse to grant summary judgment in these actions because it is felt that a fuller record is necessary in order to be able to decide properly the issues involved.
> 10B Charles Alan Wright et al. F*ederal Practice and Procedure* § 2732.2 (1998) This is such a case."

The order of the Court of Appeals decides most of the constitutional questions without hearing transcripts, briefing or argument. It is prior restraint of future speech based on content. It claims that Dan should have known, without warning, that in addition to responding to the issues raised in the motion for summary judgment

in the ten days allowed, that he had to also file the fifty page, (forty day) Appellant Brief in that same ten days because it is "a full and adequate opportunity is afforded all parties to present the authorities which, based upon the record below, are relevant to the issues and determinative of the appeal," (Appendix, A-6) (Neither party "presented authorities" on the constitutional issues during summary judgment)

The Supreme Court said in Alexander v. U.S. 509 U.S.544 at page550 (1993):

> "The term "prior restraint" is used "to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.' M. Nimmer, Nimmer on Freedom of Speech § 4.03, p.4-14 (1984) (emphasis added)."

The only "speech" and "petition [to] the Government for a redress of grievances" that can go to a state appellate court is by right of appeal. One can speak at city council meetings, go to the office of a senator or call the governor on the phone. There are none of these channels of communication between citizens and the appellate courts. Only jurisdiction, standing and a timely right of appeal to state appellate judges can get a response if one wants to complain how they are denying rights. There is danger in allowing the Court of Appeals to suppress this speech for it prevents change or correction of society's problems.

16 Am Jur § 526 says (all citations omitted): "The right to petition extends to all departments of the government; the right of access to the courts is but one aspect of the right to petition."

§ 527 says this right "is equally fundamental" as "Free speech and free press" and "neither state nor federal officers - whether executive, legislative, or judicial - may assume the power to deny or curtail the right of the people to petition the government."

In *Turner Broadcasting System, Inc. v. F.C.C.* 512 U.S. 622 at page 641 (1994) the Supreme Court says: (citations omitted)

> "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal. Government action that stifles speech on account of its message, or that it requires the utterance of a particular message favored by the Government, contravenes this essential right. Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion. These restrictions 'rais[e] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'"

Even if Dan is wrong that state laws and appellate courts are destroying families and marriage, he has the right to brief his arguments to the appellate courts. Justice Brennan said: "*Roth v. United States*, 354 U.S. 476 at page 484 (1957):

> "All ideas having even the slightest redeeming social importance-unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion-have the full protection of [First Amendment] guaranties, *unless* excludable because they encroach upon the limited area of more important interests."

The Utah Court of Appeals has violated the First Amendment by deciding the constitutionality of the statute without allowing any briefing or alternate forums of communication for those who raised the questions. The district court passed on addressing the constitutional issues, so the Court of Appeals cannot summarily affirm **and then** decide constitutionality of the statute. A petition to the government for redress is fleeting, indeed, if the right of appeal consists of only of asking a few questions.

CONCLUSION

It is undisputed by any court or the Judicial Conduct Commission that the Federal Constitution was violated in this case. Although many changes in procedures are being made by the Utah Appellate Courts to eliminate abuse of constitutional rights, that is no cure for the defective statute under challenge.

Th U.S. Supreme Court should grant certiorari to enforce the minimum standards of due process so this statute can be reviewed under *Troxel v. Granville*, 530 U.S. ___ (June 5, 2000).